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2018 DEC -6 P 2:34

NYE COUNTY CLERK

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DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE

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PAHRUMP FAIR WATER, LLC, a Nevada
limited-liability company; STEVEN PETERSON,
an individual; MICHAEL LACH, an individual;
PAUL PECK, an individual; BRUCE JABOUR,
an individual; and GERALD SCHULTE, an
individual,

Petitioners,

vs.

JASON KING, P.E., Nevada State
Engineer, DIVISION OF WATER RESOURCES,
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES,

Respondent.

Case No. 39524

Dept. No. 2

ORDER GRANTING PETITION FOR JUDICIAL REVIEW

THIS MATTER comes before the Court on Petitioners' Petition for Judicial Review of Respondent's Amended Order 1293A. Petitioners filed their Opening Brief on September 11, 2018. Respondent filed his Answering Brief on or around October 8, 2018. Petitioners filed their Reply Brief on November 1, 2018. The Court heard oral argument on November 8, 2018, in Pahrump, Nevada. Petitioners are represented by Paul G. Taggart, Esq. and David H. Rigdon, Esq., of Taggart & Taggart, Ltd. Respondent is represented by Attorney General Adam P. Laxalt and Deputy Attorney General James N. Bolotin.

1 This Court, having reviewed the record on appeal and Petitioner's Supplemental Record on
2 Appeal, and having considered the parties' arguments, the applicable law, State Engineer Amended
3 Order 1293A, and all pleadings and papers on file herein, hereby **GRANTS** Petitioners' Petition for
4 Judicial Review based upon the following findings of fact and conclusions of law.

5 **I. Facts and Procedural History**

6 On December 19, 2017, the State Engineer issued Order 1293 (the "Order") wherein he restricted
7 the drilling of new domestic wells on existing parcels of land within the Pahrump basin. Despite the
8 fact that the average domestic well in Pahrump uses less than 0.5 acre-feet of water per year, Order 1293
9 required a property owner to obtain two acre-feet of existing water rights, and relinquish those rights to
10 the State Engineer, in order to drill a domestic well. Prior to issuing Order 1293, the State Engineer did
11 not provide any notice to affected property owners, nor did he provide any opportunity for those property
12 owners to provide comments or submit evidence in opposition to the Order. While it is still unclear
13 exactly how many parcels are directly affected by the Order, the Order could affect as many as 8,000
14 existing residential lots within the basin that are currently unbuilt.

15 Petitioner, PFW timely filed a Petition for Judicial Review of Order 1293. PFW filed its Opening
16 Brief in that appeal on July 6, 2018. On July 12, 2018, without providing any notice to the Court or
17 opposing counsel, the State Engineer issued Order 1293A (the "Amended Order"). On July 18, 2018,
18 the State Engineer filed a motion to dismiss PFW's appeal of Order 1293, claiming that the issuance of
19 Order 1293A rendered the appeal moot. The State Engineer stated in the motion to dismiss that "Order
20 1293A supersedes any legal force and effect of Order 1293" and therefore "Order 1293 is no longer
21 legally valid or enforceable." Like Order 1293, Order 1293A was issued without providing any notice
22 to affected property and without providing an opportunity for affected persons to provide comments or
23 challenge the evidence the State Engineer relied upon. In substance and effect, Order 1293A is nearly
24 identical to Order 1293. The only difference is that Order 1293A provides two additional exemptions
25 to the drilling restriction. Of these exemptions, one allows individuals who filed a notice of intent to
26 drill a domestic well before the issuance of Order 1293, and who had those notices subsequently rejected
27 by the State Engineer, to refile the notices and drill their wells.

1 On August 8, 2018, the parties entered into a settlement agreement whereby PFW agreed to
2 voluntarily dismiss the appeal of Order 1293 and file a new petition for judicial review of Order 1293A.
3 In exchange, the State Engineer agreed to an expedited briefing schedule and to expedite the scheduling
4 of a hearing on the new appeal. On August 10, 2018, the parties filed a stipulation requesting dismissal
5 of the previous appeal. On that same day, PFW submitted a new petition for judicial review of Order
6 1293A to the Court and served the same on the State Engineer.

7 During briefing, Petitioners argued that Respondent did not have legal authority to restrict
8 drilling of domestic wells, Respondent violated constitutional due process in the issuance of the
9 Amended Order, the Amended Order is unsupported by substantial evidence, and that the Amended
10 Order amounts to an unconstitutional taking of private property without just compensation. Respondent
11 argued that he does have the required legal authority to issue the Amended Order and that the Amended
12 Order was based on substantial evidence, the Amended Order does not violate due process protections,
13 Petitioners improperly alleged a taking claim, no taking resulting from the Amended Order occurred,
14 and that Petitioners lack legal standing to bring the instant action. In their reply brief, Petitioners
15 reasserted Respondent's lack of legal authority to issue the Amended Order, the violation of basic
16 constitutional due process in issuing the Amended Order, the lack of substantial evidence in the record
17 to support the Amended Order, the unconstitutionality of the Amended Order, and their constitutional
18 and statutory right to bring this action.

19 Petitioners claim certain undisputed facts are present in this proceeding. Petitioners claim these
20 undisputed facts include that the Pahrump basin is not currently being over-pumped, groundwater
21 pumping in Pahrump has declined since 1969, as a result of this reduction in pumping, water levels in
22 some portions the basin have leveled off or significantly rebounded (in some cases by as much as 45
23 feet), and the Amended Order contains no scientific analysis of whether the drilling of additional
24 domestic wells impact existing wells in the basin.

25 **II. Standard of Review**

26 Under NRS 533.450, a party aggrieved by a State Engineer's order or decision is entitled to have
27 the order or decision reviewed in the nature of an appeal. The role of the reviewing court is to determine
28 if the State Engineer's decision was arbitrary, capricious, an abuse of discretion, or is otherwise affected

1 by prejudicial legal error.¹ A decision is arbitrary if it was made “without consideration of or regard for
2 facts, circumstances, fixed rules, or procedures.”² A decision is capricious if it is “contrary to the
3 evidence or established rules on law.”³ With regard to factual findings, the Court must determine
4 whether substantial evidence exists in the record to support the State Engineer’s decision.⁴ Substantial
5 evidence is “that which ‘a reasonable mind might accept as adequate to support a conclusion.’”⁵

6 In *Revert v. Ray*, the Nevada Supreme Court articulated the procedural safeguards the State
7 Engineer must employ prior to issuing an order or decision.⁶ First, the State Engineer must provide
8 affected parties with a “full opportunity to be heard” and “must clearly resolve all the crucial issues
9 presented.”⁷ Next, the State Engineer’s order or decision must include “findings in sufficient detail to
10 permit judicial review.”⁸ Finally, if such procedures are not followed and “the resulting administrative
11 decision is arbitrary, oppressive, or accompanied by a manifest abuse of discretion,” a court should not
12 hesitate to intervene and block the enforcement of the order or decision.⁹

13 Here, the State Engineer provided no notice that he was intending to issue the Amended Order,
14 nor did he hold any hearing or seek any comments from affected property owners. Accordingly, unlike
15 with other appellate-type proceedings, there is little to no record below for the Court to review. While
16 the State Engineer has provided an ostensible “record on appeal” for the Court’s consideration, this
17 record consists of only the documents the State Engineer claims he relied on in making his decision.
18 None of the documents have been authenticated or validated, nor have the authors of the documents
19 been required to testify in a formal hearing or been subjected to cross-examination. In addition, no one
20 from the State Engineer’s office has provided any testimony or evidence supporting his claim of reliance
21 on these documents. Accordingly, none of the processes and procedures which are designed to ensure
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24 ¹ *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996) (citing *Shetakis Dist.*
v. State, Dep’t of Taxation, 108 Nev. 901, 903, 839 P.2d 1315, 1317 (1992)).

25 ² BLACK’S LAW DICTIONARY 125 (10th ed. 2014) (definition of “arbitrary”).

26 ³ BLACK’S LAW DICTIONARY 254 (10th ed. 2014) (definition of “capricious”).

27 ⁴ *Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979).

28 ⁵ *Bacher v. State Eng’r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (quoting *State, Emp. Sec. Dep’t v. Hilton Hotels Corp.*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

⁶ *Revert*, 95 Nev. 782, 603 P.2d 262.

⁷ *Revert*, 95 Nev. at 787, 603 P.2d at 264-65.

⁸ *Revert*, 95 Nev. at 787, 603 P.2d at 265.

⁹ *Id.*

1 a full and fair opportunity to challenge evidence before a decision, or to verify that evidence submitted
2 to the Court is relevant and accurate have been followed.

3 The State Engineer claims “[d]ecisions of the State Engineer are entitled not only to deference
4 with respect to factual determinations, but also with respect to legal conclusions.”¹⁰ The Nevada
5 Supreme Court has clearly and unambiguously held that “[w]hile the State Engineer’s interpretation of
6 a statute is persuasive, it is not controlling”¹¹ and that a reviewing court is required to “decide pure legal
7 questions *without deference* to an agency determination.”¹² The latter of these holdings was issued this
8 year and reflects the Nevada Supreme Court’s current thinking. The State Engineer asserts that this
9 Court should adopt a *Chevron*-like standard of review to the State Engineer’s legal conclusions.¹³ The
10 State Engineer initially cites NRS 533.450 as the basis for his assertion. However, NRS 533.450
11 establishes no such standard, either expressly or by implication, and the Nevada Supreme Court has
12 never adopted the *Chevron* standard for purely legal questions. In fact, in *Town of Eureka*, the Supreme
13 Court held just the opposite – that a “district court is free to decide purely legal questions . . . *without*
14 *deference* to the agency’s decision.”¹⁴

15 **III. The State Engineer Exceeded His Statutory Authority.**

16 The language of NRS 534.030(4) is plain and unambiguous. The statute grants the State
17 Engineer general supervisory power over all groundwater wells in Nevada *except* domestic wells. The
18 history of this particular provision, and of the groundwater law in general, demonstrate that the
19 Legislature purposely intended to exempt domestic wells from the State Engineer’s regulatory authority
20 except in certain limited circumstances inapplicable to the present case. Accordingly, the Amended
21 Order is an invalid exercise of authority that the State Engineer does not possess.

22 Two separate and distinct protections for domestic wells are provided in NRS 534.180(1) and
23 NRS 534.030(4) which are exemptions from the State Engineer’s general regulatory control. Under
24 NRS 534.180(1), domestic wells are exempt from the State Engineer’s permitting process while NRS
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26 ¹⁰ Answering Brief at 8:20-21 (citing *State v. State Eng’r*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988)).

27 ¹¹ *Town of Eureka v. Office of State Eng’r, State of Nev., Div. of Water Res.*, 108 Nev. 163, 165-66, 826 P.2d 948, 950 (1992).

28 ¹² *Felton v. Douglas Cty.*, 134 Nev. Adv. Op. 6 at 3, 410 P.3d 991, 994 (2018) (emphasis added).

¹³ See *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984) (establishing a deferential standard of review for federal courts reviewing legal determinations of federal agencies).

¹⁴ *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949 (citing *Jones v. Rosner*, 102 Nev. 215, 217, 719 P.2d 805, 806 (1986)) (emphasis added).

1 534.030(4) separately exempts them from the State Engineer's general supervisory control.
2 Accordingly, the State Engineer is wrong when he claims that "NRS 534.030(4) specifically exempts
3 domestic wells from the permitting process."¹⁵ Instead, as shown above, it is NRS 534.180(1) that
4 exempts domestic wells from the permitting process while NRS 534.030(4) provides an additional
5 exemption that removes domestic wells from the State Engineer's general supervisory control.

6 Because domestic wells are afforded an exemption from the State Engineer's regulatory purview,
7 the only way he can issue a regulation governing them is if he can point to a specific statute that overrides
8 the general exemption and authorizes him to do so. With respect to the Orders in question, no specific
9 statutory authority exists to justify the Orders. The Legislature must be presumed to mean what it says,
10 and say what it means.¹⁶ When the Legislature has seen fit to apply specific provisions of the water law
11 to domestic wells, it has done so with unambiguous language and clear intent. Where, as here, the
12 Legislature has not clearly expressed such intent in a statute, it cannot be presumed to intend that
13 outcome. Accordingly, the State Engineer is not authorized by the general language in NRS 534.120(1)
14 to place the restrictions contained in NRS 534.110(8) on domestic wells.

15 **IV. The State Engineer Should Have Provided Notice To Property Owners.**

16 The State Engineer issued Order 1293 on December 19, 2017, without any prior notice or
17 publication and without holding a hearing. Order 1293A was issued while the appeal over Order 1293
18 was pending. The State Engineer issued Order 1293A without any prior notice or publication. These
19 facts are a matter of public record and are undisputed. The Nevada Supreme Court has ruled that prior
20 to issuing a regulation affecting an interest in real property a regulatory body must provide personal
21 notice to each affected property owner.¹⁷ Said notice must include the content of the regulation so that
22 affected parties can adequately prepare to oppose it.¹⁸ Finally, the regulatory body must hold a hearing
23 and allow affected property owners the opportunity to provide testimony and evidence related to the
24 regulation.¹⁹ A failure to follow these steps is a constitutional due process violation that renders the
25 regulation invalid. Because the Orders impair a vested property right, and because the State Engineer

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27 ¹⁵ Answering Brief at 12:21-22.

¹⁶ *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149 (1992).

¹⁷ *Bing Const. Co. of Nev. v. Cty. of Douglas*, 107 Nev. 262, 266, 810 P.2d 768, 770-71 (1991).

¹⁸ *Id.*

¹⁹ *Id.*

1 failed to provide notice or hold a hearing before issuing the Orders, the Orders are hereby deemed
2 invalid.

3 **V. Substantial Evidence Does Not Support Order 1293A.**

4 Even if the State Engineer had the authority to apply NRS 534.110(8) to domestic wells, before
5 he can do so he must demonstrate that additional wells will unduly interfere with wells that already exist.
6 In his Answering Brief, the State Engineer makes the conclusory statement that “[i]t is clear that if
7 existing pumping rates will lead to well failures, an increase in the number of wells and therefore an
8 increase in pumping will accelerate the problem – undoubtedly causing an undue interference with
9 existing wells.”²⁰ However, there is a major problem with this statement – it is not backed by any
10 evidence or facts in the record and the State Engineer provides no citation to any evidence.

11 Here, the State Engineer did not perform a full conflicts analysis or make a determination about
12 how, specifically, the restrictions in Order 1293A will benefit existing wells. Instead, the State Engineer
13 relied exclusively on a groundwater model that was never designed to determine whether new wells
14 would cause undue interference with existing wells.²¹ Instead, the model was designed to determine the
15 likelihood of well failures resulting from the pumping of existing wells in the basin.

16 The State Engineer also did not make any determination or employ any objective standards
17 regarding what constitutes an “undue” interference with an existing well. Under NRS 534.110(4), all
18 appropriations of groundwater must allow for a “reasonable lowering of the static water level at the
19 appropriator’s point of diversion.” Nowhere in the Orders does the State Engineer set an objective
20 standard for determining whether predicted declines in the water table are reasonable. This is an
21 important pre-requisite for any conflicts analysis because if the declines caused by existing or new wells
22 are reasonable then, by definition, such declines cannot be said to unduly interfere with existing wells.

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27 ²⁰ Answering Brief at 10:27-11:2.

28 ²¹ Notably the State Engineer fails in his Answering Brief to address any of the criticisms of the groundwater study raised by
Petitioners’ in their Opening Brief. Such failure should be deemed an admission that Petitioners’ arguments are meritorious
and that the groundwater study is fundamentally flawed and, therefore, cannot be considered substantial evidence supporting
the issuance of the Orders.

1 **VI. Petitioner's Claim That Order 1293A Is An Unconstitutional Taking.**

2 Petitioners argue that Order 1293A is an unconstitutional taking of private party without just
3 compensation. They allege that the requirement to purchase and forever relinquish water rights to the
4 State Engineer is a per se taking of that property. They further allege that the ban on the drilling of a
5 new domestic well on an existing parcel is also a regulatory taking. Respondent alleges that NRS
6 Chapter 37 provides the exclusive means to bring an action for a taking and that the issue is not ripe for
7 adjudication at this time.

8 The Court has already determined that the Respondent (1) did not have legislative authority to
9 issue Order 1293A, (2) violated due process in the issuance of Order 1293A, and (3) issued Order 1293A
10 without substantial evidence to support it. Because of this Oder 1293A is invalid. Accordingly, the
11 Court finds that there is no need at this time to make a determination with respect to whether Order
12 1293A is an unconstitutional taking of private property without just compensation.

13 **VII. Respondent's Claim That Pahrump Fair Water, LLC Lacks Standing.**

14 Respondent argues that Petitioner PFW has no standing to file or participate in this action.²² The
15 Court finds that this argument is without merit. PFW has both statutory and constitutional standing to
16 assert the interests of its members because it is an association that was formed for the express purpose
17 of doing so.²³

18 In *Citizens for Cold Springs v. City of Reno*,²⁴ the Court reviewed the grant of statutory standing
19 contained in NRS 268.668 regarding annexation decisions. In that case, the Court held that an
20 association of property owners that would be affected by an annexation decision had standing to
21 challenge that decision.²⁵ The Court interpreted the language of NRS 268.668 which grants standing to
22 "any person or city claiming to be adversely affected by such proceeding."²⁶ Since the statute says that
23 any person claiming to be adversely affected may bring an action, in the "tradition of [its] long-standing
24 jurisprudence," the Court found that standing rights under NRS 268.668 are broader that what
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27 ²² Answering Brief at 29:8-12.

²³ SROA 858:22-859:1.

²⁴ *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 218 P.3d 847 (2009).

²⁵ *Id.*, 125 Nev. at 634, 218 P.3d at 853.

²⁶ *Id.*, 125 Nev. at 629, 218 P.3d at 850.

1 constitutional standing allows.²⁷ The Court specifically focused on the NRS 268.668 grant of standing
2 to any person claiming to be aggrieved.²⁸ Based on that language the Court held that even property
3 owners who do not have constitutional standing because they did not own property in the area of
4 annexation at issue do have standing under NRS 268.668.²⁹

5 Further, an association has standing to bring suit on behalf of its members when (1) its members
6 would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane
7 to their organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the
8 participation of individual members in the lawsuit.³⁰ Here, PFW has members that would otherwise
9 have the right to bring this action on their own. Also, because PFW was formed for the express purpose
10 of fighting the Orders,³¹ this challenge is germane to its purpose, and it is not necessary to have
11 individual members participate in the lawsuit. Finally, the participation of the individual members of
12 PFW is not required in order to resolve the issues raised in PFW's Petition because only declarative and
13 injunctive relief is being sought.

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27 ²⁷ *Id.*, 125 Nev. at 630-31, 218 P.3d at 851.

28 ²⁸ *Id.*

29 ²⁹ *Id.*, 125 Nev. at 631, 218 P.3d at 851.

30 ³⁰ *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977).

31 ³¹ SROA 858:22-859:1.

ORDER

UPON CONSIDERATION, and good cause appearing therefore, the Court hereby finds that Amended Order 1293A was arbitrarily and capriciously issued and orders that Amended Order 1293A be reversed.

IT IS HEREBY ORDERED that Petitioners' Petition for Judicial Review is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that Respondent's Amended Order 1293A is **REVERSED**.

IT IS HEREBY FURTHER ORDERED that Respondent shall issue an order noticing the reversal of Amended Order 1293A within five (5) days of the ^{receipt}~~signing~~ of this order.
SVC

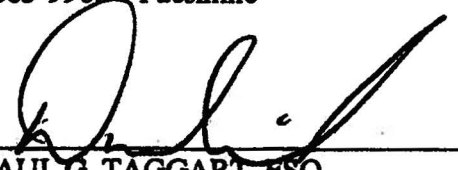
IT IS SO ORDERED.

DATED this 3 day of December, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

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